

with timely notice of his accidental injury and, therefore, requests the Board to grant his request for preliminary hearing benefits.

Conversely, respondent and its insurance carrier request the Board to affirm the Preliminary Decision.

The only issue raised to the Board on this appeal is whether claimant provided respondent with timely notice of the accidental injury as required by the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant worked off and on a number of years for respondent, which is a concrete company that is owned by claimant's former brother-in-law, John Smith. Claimant's job duties as a cement mason, or concrete finisher, required him to set up forms, grade rock, pour concrete and finish it. The job required claimant to work on his knees.

According to claimant, in approximately June or July 2002 he began experiencing symptoms in his knees. Those symptoms allegedly worsened as claimant continued to work. In about August or September 2002, claimant allegedly advised respondent's owner about the symptoms in his knees and that he needed to see a doctor. Respondent did not provide claimant with treatment. But claimant purchased knee braces that he began wearing to work. Claimant testified that he told respondent's owner about wearing those braces.

According to claimant, despite wearing the knee braces his symptoms continued to worsen as he worked for respondent. Claimant's last day of working for respondent was approximately December 6, 2002. Claimant testified that he stopped working for respondent due to the weather and that he then decided to have his knees examined. Claimant testified, in part:

Q. (Mr. Stang) And how did that come to be your last day?

A. (Claimant) Well, after that we had a good hard day on that Friday [December 6, 2002] and I really blew my knees out that day and the next week we had a rain week and there wasn't no work for that week and then that's when I decided, I

checked to see what is happening with these knees, you know, if I was going to have them fixed or what.²

According to claimant, he called respondent's owner on approximately December 9, 2002, and allegedly advised that he needed to do something about his knees. Claimant testified that Mr. Smith advised him to make a claim against another company, Olathe Concrete, where claimant would later work.

On December 11, 2002, claimant worked for approximately three hours for Olathe Concrete before slipping and twisting his back. According to claimant, he did not injure his knees on that job as he did very little physical labor and did not work on his knees. That is the only employment that claimant has held since last working for respondent, although he has assisted, without pay, some friends who either own or work for a local tavern by burning boxes and doing other chores.

When claimant testified at the June 2003 preliminary hearing, he had not received any treatment for his knees. But claimant's attorney had referred claimant to Dr. Michael Poppa for a physical examination. In February 2003, claimant saw Dr. Poppa, who diagnosed bilateral patellar tendinitis and bilateral patellofemoral syndrome. The doctor gave claimant work restrictions and recommended treatment for his knees.

But Mr. Smith also testified at the preliminary hearing and contradicted important areas of claimant's testimony. Mr. Smith testified that claimant never told him that he had injured his knees at work. Mr. Smith also testified that claimant did not work for a period from mid to late April towards the end of June 2002 as he never called regarding work and he quit showing up. In the latter part of June 2002, claimant returned to work and worked until October 25, 2002, when he was fired. Claimant later worked for respondent on December 5 and 6, 2002, as one of Mr. Smith's business partners requested him. Mr. Smith also contradicted claimant's assertion that the weather prevented respondent's employees from working the week following December 6, 2002.

Judge Foerschler had the opportunity to observe both claimant and Mr. Smith testify at the preliminary hearing. The Judge found Mr. Smith more credible and denied claimant's request for benefits, finding that claimant had failed to prove that he had provided respondent with timely notice of the accidental injury. In this instance, the Board defers to the Judge's assessment of credibility and, likewise, finds that claimant has failed, based upon this record, to prove that he provided respondent with timely notice of the accident or injury as required by K.S.A. 44-520. Under that statute, an injured worker is

² P.H. Trans. at 17.

required to provide an employer with notice of the accidental injury either within 10 days of its occurrence or, if just cause is shown, within 75 days of the accidental injury.

As the present record fails to prove that claimant provided respondent with timely notice of the accidental injury, the Board must deny claimant's request for benefits.

As provided by the Workers Compensation Act, preliminary hearing findings are not final as they may be modified in a subsequent preliminary hearing or upon a full hearing of the claim.³

WHEREFORE, the Board affirms the June 26, 2003 Preliminary Decision.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a).